FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1373

OSCAR K. SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SOL C. BERENHOLTZ,
Attorney for Petitioner.

The Daily Record Co., Baltimore 3, Md.

INDEX

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. .....

OSCAR K. SMITH,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Oscar K. Smith, Petitioner, prays that a Writ of Certiorari issue to review the judgment and order of the United States Circuit Court of Appeals, Fourth Circuit, entered by it on January 30, 1947, affirming the judgment and decree of the United States District Court, District of Maryland.

A.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

A Libel in Admiralty was filed by Oscar K. Smith, who was employed as Acting Chief Mate on the SS. MILTON J. FOREMAN, a Liberty ship owned by the United States, and operated for the War Shipping Administration by the International Freighting Corporation as its General Agent. The Libel was filed pursuant to the Suits in Admiralty Act, 46 USCA §781, which permits suits to be filed against the Government in any case where the vessel is owned or operated by the Government, and where if it were privately owned, a suit in admiralty could be maintained. The Petitioner, who of course was the Libelant below, alleged that the vessel's Slop Chest was not in conformity with the Slop Chest Statute, 46 USCA §670, which provides that every vessel engaged in a foreign voyage (as the MILTON J. FOREMAN was in this case).

> "* * * shall also be provided with a Slop Chest which shall contain a complement of clothing for the intended voyage for each seaman employed, including boots or shoes, hats or caps, underclothing and outer clothing, oiled clothing, and everything necessary for the wear of a seaman; also a full supply of tobacco and blankets. Any of the contents of the slop chest shall be sold, from time to time, to any or every seaman applying therefor, for his own use, at a profit not exceeding 10 per centum of the reasonable wholesale value of the same at the port at which the voyage commenced. And if any such vessel is not provided, before sailing, as herein required, the owner shall be liable to a penalty of not more than $500. The provisions of this section shall not apply to vessels plying between the United States and the Dominion of Canada, Newfoundland, the Bermuda Islands, the Bahama Islands, the West Indies, Mexico and Central America."

The voyage for which the Petitioner was engaged was the maiden voyage of the vessel and while her Slop Chest was supplied with a dozen pair of rubber boots, they were all small sizes, and none of them were large enough to fit the Petitioner, although the sizes which he wore and could wear were not unusual and were sizes that were customarily carried in ships' Slop Chests. The vessel experienced unusually bad and rough weather for the entire trip to England and return, encountering rains and storms throughout; or as the Master put it—the weather was really "foul"—and it was an unusually wet voyage. The Petitioner was able to purchase oil-skins from the ship's Slop Chest which protected him down to just above the knees, but he was unable to obtain any rubber boots until practically at the end of the voyage, when he was finally able to obtain a pair of rubber boots from one of the members of the Navy Gun Crew aboard the ship. There were no high top shoes or rubbers in the Slop Chest, nor did he have any of his own. He therefore was exposed to the rains, storms, seas, and bad weather conditions in ordinary low cut conventional shoes during all of his watches on the bridge, and during the time that he had to work in the lower holds and bilges, which necessitated his standing in water without any rubber boots or any other protection to his feet. He developed a cold shortly after the vessel began its voyage which continued to grow worse during the voyage, and he developed a cough which disturbed his sleep and rest; he lost weight; he lost his appetite and developed a fever.

The voyage began on November 15, 1944 at Savannah, Georgia, and the vessel arrived back at the port of New York on January 5, 1945. Shortly thereafter it was found that he had a Tubercular lesion of recent origin and he was ultimately sent to the Maryland Tuberculosis Sanatorium

at Sabillesville, Maryland, where he was treated as a hospital patient from February 28, 1945 until May 14, 1946, when he was discharged with instructions to report there periodically for examinations and advice for a period of a year, at the end of which time it was expected, that if he continued to make the same progress, that he would then be able to return to work. He was examined by a physician on behalf of the Respondent **before** he was accepted for employment, and was found to be in good physical condition.

The Petitioner alleges that as a proximate result of Respondent's failure to comply with the provisions of the Slop Chest Statute, in that it failed to have rubber boots of a proper size to fit the Petitioner, an inactive and dormant Tubercular infection was lighted up and aggravated into an active Tubercular condition.

The District Court disallowed the Petitioner's claim for damages and allowed him only maintenance. The judgment of the District Court was affirmed by the Circuit Court of Appeals.

B.

JURISDICTION.

The date of the judgment or order of the Circuit Court of Appeals is January 30, 1947. This Honorable Court on April 28, 1947, extended the time for filing a Petition for Certiorari in this case to and including May 15, 1947 (R. 131).

The jurisdiction of this Honorable Court to grant the Petition for Writ of Certiorari is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938 (28 USCA §347) which authorizes this Court upon petition of any party to a cause in a Circuit

Court of Appeals to require by Certiorari that the cause be certified to this Court for determination by it with the same power and authority and with like effect as if the cause had been brought here by unrestricted appeal.

The suit was originally brought under the Jones Act, 46 USCA §688 to recover damages suffered by the Petitioner by reason of the Respondent's failure to comply with the Slop Chest Statute, 46 USCA §670. It therefore gave rise to an important question of Federal Law which has not been, but should be, settled by this Court. The proper meaning and construction of the Slop Chest Statute is not a matter affecting only the parties to this cause, but directly affects every officer and every seaman sailing on American merchant vessels, and likewise affects and concerns all owners and operators of American merchant vessels making either foreign or intercoastal voyages. The Slop Chest Statute has never been judicially interpreted or construed. The decision rendered by the District Court and affirmed by the Circuit Court of Appeals in this case does violence to the clear, simple and express commands of the statute which has been in force and has been complied with since 1884. To allow the decision of the District Court to stand as the law of this land would be judicial legislation destroying the obvious purpose of an Act of Congress which this Honorable Court declared to be "for the further protection of seamen", The Iroquois, 194 US 240, and for the "comfort and health of seamen aboard ship." Aguilar v. Standard Oil Co., 318 U. S. 724, 727, 728.

C.

QUESTIONS PRESENTED.

1. *Does the Slop Chest Statute (46 USCA §670) give rise to a cause of action under the Jones Act (46 USCA §688) in favor of an officer of an American Merchant Vessel engaged on a foreign voyage where the vessel's Slop Chest is*

not supplied, at the commencement of the voyage, with proper and customary sizes of rubber boots?

The Petitioner contends that:

(a) The Act should be liberally construed.

(b) The Slop Chest is a safety statute.

(c) Even if it is not considered a safety statute, it is nevertheless a statutory requirement which must be complied with by a shipowner.

(d) The statute imposes a non-delegable duty upon the shipowner.

2. *Did Respondent comply with Slop Chest Statute?*

The Petitioner contends:

(a) That the Respondent did not, as a matter of law or fact, comply with the statute.

(b) That Respondent is not excused from its failure to comply with the statute.

3. *Did Respondent's failure to comply with the Statute cause, or contribute to, the Petitioner's illness and disability?*

The Petitioner contends that the **uncontradicted** evidence in this case conclusively shows:

(a) That it caused his illness and disability.

(b) That it substantially contributed to Petitioner's illness and disability.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(a) The proper meaning and construction of the Slop Chest Statute gives rise to an important question of Federal law which has not been, but should be, settled by this Court.

The proper meaning and construction of the statute is not a matter affecting only the parties to this cause, but directly affects every officer and every seaman sailing on American merchant vessels, and likewise affects and concerns all owners and operators of American merchant vessels making either foreign or inter-coastal voyages.

(b) The Slop Chest Statute (46 USCA §670) has never been judicially interpreted or construed.

(c) The decision of the Trial Court is not in accord with applicable decisions of this Court in related cases.

(d) The Trial Court erred in its conclusion of law that the Slop Chest Statute is not a safety statute within the meaning of Title 45, USCA §53 (Federal Employees Liability Act) which provides that contributory negligence of the employee:

> "* * * shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

in an action brought under the Jones Act, 46, sec. 688, which reads as follows:

> "any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *".

(e) The Trial Court erred in not finding that the failure to comply with the Slop Chest Statute constituted negligence as a matter of law in failing to provide proper size boots.

(f) The Trial Court erred, as a matter of law and fact, in finding that Respondent substantially complied with the Slop Chest Statute.

(g) The Trial Court erred, as a matter of law, in measuring the Respondent's duty to comply with the Slop Chest Statute by the provision of Operations Regulation No. 13 promulgated by the War Shipping Administration which provides, in part, as follows:

> "It shall be the responsibility of each General Agent and Master to exercise reasonable care and diligence in the compliance with the owners obligations herein, and in the protection and disposition of the contents of the Slop Chests."

The statute itself imposes the extent of the duty and no agreement between a shipowner and his agent can modify his liability or duty to comply with the statute to a degree or extent less than the statutory requirement itself.

(h) The Trial Court erred in its finding that the Petitioner has not convincingly shown that his Tuberculosis was proximately caused by getting wet feet due to not getting rubber boots or that the absence of the latter was a material contributory cause to his condition, although the Court found that there was evidence legally sufficient to prove it. The Respondent offered **no** evidence of any kind to contradict the evidence offered by the Petitioner to show proximate cause, although the Respondent had the Petitioner examined by a doctor **before** it accepted him for employment, and it also had him examined by a Tuberculosis expert before the trial, presumably for the purpose

of obtaining a report from said physician, and also to enable him to testify at the trial. Petitioner called for this report at the trial which, however, Respondent failed and refused to produce.

(i) The lower Court erred in not awarding the Petitioner compensatory damages.

PRAYER.

Your Petitioner therefore prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals, Fourth Circuit, commanding the said Court to certify and send to this Court, a full and complete transcript of the Records and all of the proceedings of the said Court in the case entitled Oscar K. Smith vs. United States of America, No. 5563, upon the general docket of said Court, in order that this cause may be reviewed and determined by this Court, as in such case is provided by sec. 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938 (28 USCA §347).

OSCAR K. SMITH,
Petitioner.

SOL C. BERENHOLTZ,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

RECORD OF OPINION.

The opinion of the District Court is reported in 66 Fed. Supp. 933 and the opinion of the Circuit Court of Appeals is reported in 159 Fed. (2nd) 247.

B.

GROUNDS UPON WHICH JURISDICTION IS INVOKED.

The grounds upon which jurisdiction is invoked have been concisely set forth in the Petition heretofore contained under the heading "JURISDICTION".

C.

CONCISE STATEMENT OF THE CASE.

The Libelant, Oscar K. Smith, is thirty-two years of age and holds a Second Mate's license, has been following the sea since 1930. He was introduced to Captain Darrall E. Keith in Baltimore, Maryland, on October 22nd, 1944, and together they left for Savannah, Georgia, on October 24th, 1944, where the vessel was being put into commission for her first voyage (R. 67). He was employed to serve as Acting Chief Mate of this vessel with base pay of $254.00 per month, plus certain bonuses and overtime, together with the value of his quarters and food aboard ship, which latter two items are considered to be worth $6.00 per day. He had never experienced any illness of any importance prior to his being employed by the Respondent in this case nor had he lost any time from work during the past several years prior to his service aboard the vessel in this case, with the exception of one or two occasions when he had minor illnesses of short duration (R. 24). He has had a

post nasal drip due to a sinus condition which he has had for the past ten years and still has (R. 54, 64) which usually made it necessary for him to clear his throat upon arising each morning, after which he would have no other untoward effects for the balance of the day (R. 68). He is married and has one child, and no member of his family or his parents have ever suffered with tuberculosis (R. 23). Prior to his service on this vessel he was examined by a Doctor on behalf of the Respondent and was found fit for duty and accepted for employment. At his own request he was examined by another Doctor of the United States Public Health Service at Savannah, Georgia, with reference to a condition found to be caused by his gall bladder and he was instructed not to eat fried eggs or rich food and that since following this advice he has had no further trouble with his gall bladder. He had never experienced any loss of weight or loss of appetite or any unusual fatigue prior to his service on this ship (R. 23).

The SS. MILTON J. FOREMAN, the vessel involved in this case, is a Liberty type vessel which was built in 1944 in the United States to be used in the merchant marine service for the carriage of cargo under United States registry and was placed in commission in August of 1944 in Savannah. The United States, acting through the War Shipping Administration, assigned this vessel to the International Freighting Corporation, one of its General Agents, to operate it for account of the WSA. The latter promulgated various Regulations in connection with the operation of its vessels by its General Agents. One of these Regulations covered the subject of "Slop Chests" and is known as Operation Regulation No. 13 and is dated October 7th, 1942. In this Regulation 46 USCA §670 is quoted verbatim and the General Agents are directed by this Regulation to "*provide a slop chest for the benefit of seamen for each vessel as soon*

as it enters service." This Regulation further requires the Master to submit to the General Agents a requisition for "*the items required for the intended voyage*", which shall be purchased for account of the War Shipping Administration and delivered aboard ship "*to the custody of the Master*" and the latter shall sell any of the contents of the slop chest to "*any or every seaman applying therefor*", at a profit not exceeding 10% of the reasonable wholesale value of the same at the port at which the voyage commenced. The Regulation further provides:

> "It shall be the responsibility of each General Agent and Master to exercise reasonable care and diligence in compliance with the owner's obligation, hereunder and in the protection and distribution of the contents of the slop chest."

Captain Keith of the SS. MILTON J. FOREMAN testified that the responsibility of stocking the slop chest on this ship was that of the purchasing department of International Freighting Corporation; that they stocked it first and then it was up to the Purser to keep it up to WSA requirements (R. 73-75).

William W. Jordan, Port Captain of the International Freighting Corporation, testified that he and the purchasing department of his company compiled suggested store lists and submitted them to the Captains and Officers of the vessel to go by in submitting their requests for the voyage (R. 86). These lists contain items which they found from experience were used and necessary during the voyage and also what they considered necessary in their interpretation of the Rules and Regulations to comply with the law, and they also took into consideration their experience of what was usually consumed during the voyage (R. 87). This list is then sent to the Master for review and to be added to if the Master, discussing the thing with his

Officers, needs additional items or more of any group of items. Smith had nothing to do with the contents of the slop chest (R. 111). Then it is sent back to their purchasing department for their signature before it is billed and sent to the WSA. It is handled this way because, as the witness testified, these requisitions must show that the ship's Officers and the Captain have ordered them, or, in other words, that the order originated on the ship and not with the General Agents (R. 88). He testified that this procedure was followed in this case. *The order was actually placed and filled before Smith was employed* (Res. Ex. 2). Rubber boots are customarily carried in ship's slop chests and it has been the practice of this particular company to order a dozen pairs of rubber boots when outfitting a new ship and that it is understood by the purchasing department and the ship chandler who fills their orders for slop chests that boots of various sizes should be provided, at least two pairs of each (R. 90-94). The requisition in this case was sent to the Seven Seas Supply Company who usually supply the slop chests for their vessels. Captain Jordan admitted that he does not personally know what sizes of rubber boots were delivered (R. 94), but where no sizes are mentioned it is understood that the sizes to be delivered should be from seven to twelve, inclusive. This is arranged by the office and it is checked by the stewards who represent the purchasing department (R. 94). It has been the practice of this company to have a sufficient supply to take care of the entire deck department, as the stewards department and the engine room department rarely have occasion to order rubber boots (R. 94). He testified that if he had an idea that the ship chandler was not going to send sizes seven to twelve he certainly would not have thought that they were filling the order properly (R. 95).

In due time the slop chest as well as the supplies for the medicine chest, engine room stores, as well as the stores for the radio officers and, in fact, stores for all the departments were delivered to the vessel at Savannah and apparently the Libelant was the only Officer aboard at the time and he states that he signed what turns out to be the "requisition" for all of these supplies. The Captain testified that the Purser checked the inventory for the slop chest, item by item (R. 76, 93). Both the Captain and the Port Captain admitted that any request for any additional sizes or quantity to supplement the original list if it had been sent to the company and signed by the Master would have been honored by it (R. 76, 93).

Raymond L. Fulton, who was the Purser on the vessel during the time that Libelant served on her, stated that he had nothing to do with how many boots, or items, or sizes, should be in the slop chest when the vessel was first outfitted (R. 82). The Captain could not testify as to what sizes of boots were contained in the ship's slop chest.

The vessel sailed from Savannah, Georgia, on November 15th to the Delaware Breakwater where she took her place in the convoy which was there formed, and sailed the day following her arrival at the Delaware Breakwater, destination Liverpool, England, via the North Atlantic. The morning after the vessel left Savannah, Libelant went to Mr. Fulton, the Purser who was in charge of the slop chest (R. 72) and attempted to purchase a pair of boots which he had requested the Purser to sell to him (R. 27, 80). This was the earliest time that he could possibly have attempted to purchase any boots from the slop chest because the slop chests are not permitted to be opened until the vessel leaves the last port in the United States and actually gets under way (R. 80, 73). There were no rubber boots of a size large enough to fit the Libelant who usually wore

size eleven in rubber boots. The Libelant in the presence of the Purser tried to get his feet into the largest size of boots in the slop chest but he could not get into any of them (R. 28, 80, 108-9). He does not know what sizes were contained therein but he does know that there were none of size eleven or twelve.

In the opening statement Respondent's counsel, in discussing the sizes of rubber boots in the ship's slop chest, stated *"I have not got that information and I have been unable to get it. Apparently the company has no information of what sizes were in the slop chest. They have the number of pairs when the voyage started and the number when the voyage ended but no information as to sizes."*

A day or two after leaving the Delaware Breakwater the vessel ran into terrific storms and torrential rains, and she continued to encounter storms almost the entire way across and even on the return voyage. The trip was an unusually wet one and as described by the Master it was a foul voyage (R. 72). The Libelant had come aboard the ship with two pair of ordinary leather low-cut shoes which he used interchangeably. There were no rubbers or high-top shoes in the slop chest (R. 54, 82) nor did he have any of his own. He purchased oilskins from the ship's slop chest and he had expected to purchase rubber boots there also. He had protection for his head and body but none for his feet. It had always been his practice to purchase boots, oilskins and other heavy weather garments aboard ship as he always expected to find those articles in the ship's slop chest and always did with the exception of the slop chest on this vessel (R. 25-27, 38). Of course, from the time that the vessel left Savannah the Officers and members of the crew had no further contact with the shore and they could not have gone ashore, after the vessel left Savannah, to do any purchasing.

As Acting Chief Mate he stood his watches on the exposed bridge (R. 49) standing two watches each day from 4 to 8, and each watch lasted for four hours. During the afternoon watch he would be relieved for a period of one-half hour to have coffee. As a consequence of his inability to obtain rubber boots his feet were wet almost all of the time when he was standing his watches (R. 30, 31), and in addition to the eight hours watch on the bridge each day he found it necessary to work in the forepeak hold, which had been flooded with water during the storms (R. 30, 31), and while doing his work there he would be standing in water most of the time without any protection to his feet (R. 50-52). Also, on the return voyage, one of the bilges had become fouled and it became necessary for him to work down below assisting in correcting that condition, during most of which time he had to stand in water without any protection to his feet and that condition continued up until December 31st, 1944, when he was first able to borrow a pair of rubber boots from a member of the Navy Gun crew aboard the ship, although he had previously tried to borrow a pair from the members of the crew and Officers of the vessel but was unsuccessful (R. 29, 47). While he never actually went to the Captain and made a formal complaint about his inability to purchase from the slop chest a pair of boots to fit him, Libelant states that the Captain knew he was without boots (R. 33, 45). He did not think that it was necessary to make formal complaint to the Captain, or that it was a matter to bother the Captain about since, the Purser was head of the slop chest department and he knew that Libelant could not get a pair of rubber boots to fit him (R. 45-46). It was impossible for his feet to stay dry at all in leather shoes in the kind of weather that they encountered on this voyage (R. 48). The Captain himself testified that he does not remember if Smith said anything to him about not having

boots or being unable to procure them from the ship's slop chest. The Captain would have appealed to the courtesy of the Navy Officer in charge of the Navy Gun crew had Smith said anything to him about it (R. 69). The Captain did not recall whether he saw Smith on the birdge without boots or not as he did not pay any attention to whether Smith had boots or not (R. 77).

On either the second day or the day that the vessel ran into the big storm after she left Delaware Breakwater, the Libelant developed a cold (R. 31, 49). By reason of his inability to purchase boots from the slop chest his feet were not protected from the rains and seas while on watch, and from the waters in the forepeak and in the bilges while working in those places. His cold did not leave him but kept on and he developed a cough which interfered with his rest and disturbed his sleep. He lost weight, lost his appetite and developed a fever (R. 34, 35, 50). While the vessel was at Liverpool he tried to obtain a pair of boots through the vessel's agents but again was unsuccessful. The vessel arrived at Liverpool on December 6th, 1944, and while there he stayed in his room and rested as much as possible whenever he was not required to work (R. 36). The voyage terminated at New York on January 8th, 1945, and by that time he had improved somewhat and he signed Articles with the Master to serve as Acting Chief Mate again for voyage No. 2. Before he signed these Articles he was examined by a Doctor and permitted to sign on for the next voyage. A few days thereafter he was advised by the Doctor to have an X-ray examination made of his lungs and it was then found that he was suffering from active tuberculosis of recent origin. He then left the vessel and he was subsequently admitted to the Maryland State Sanitarium at Sabillasville, Maryland, on February 28th, 1945, and was discharged as a hospital patient on

May 14th, 1946, with instructions to report there periodically for examination and advice. At that time it was noted that if he carries out the instructions given to him and progresses as well as he did while at the hospital, it was expected that he might be able to resume his regular duties in about a year following his discharge from the hospital (R. 61).

The Libelant produced two Captains, P. C. Mugge (R. 119) and R. F. Lowe (R. 120), both of whom testified that it is customary to have rubber boots in the slop chest and that the sizes should range from the small sizes up to size twelve, and that it is impractical for a man to wear a life-saving suit while working. Libelant also produced two Chief Stewards, A. J. Morris (R. 122) and Charles H. Starling (R. 123) who testified to the same effect.

Libelant's cash earnings aboard vessels for the year 1944 were $5,500.00, in addition to the value of his meals and quarters aboard ship, which is valued at $6.00 per day. He testified that there is every reason to suppose that his earnings for the years 1945, 1946 and 1947 would have been no less than what he earned in 1944. At the time he fell ill he was studying and preparing himself for Chief Mate and Master's licenses.

D.

SPECIFICATION OF ERRORS.

(a) The decision of the Trial Court is not in accord with applicable decisions of this Court in related cases.

(b) The Trial Court erred in its conclusions of law that the Slop Chest Statute is not a safety statute within the meaning of Title 45 USCA §53 in an action brought under the Jones Act 46 USCA §688.

(c) The Trial Court erred in not finding that the failure to comply with the Slop Chest Statute constituted negligence as a matter of law in failing to provide proper size boots.

(d) The Trial Court erred, as a matter of law and fact, in finding that Respondent substantially complied with the Slop Chest Statute.

(e) The Trial Court erred, as a matter of law, in measuring the Respondent's duty to comply with the Slop Chest Statute by the provisions of Operations Regulation No. 13 promulgated by War Shipping Administration.

(f) The Trial Court erred in its finding that the Petitioner has not convincingly shown that his Tuberculosis was proximately caused by getting wet feet due to not getting rubber boots, or that the absence of the latter, was a material contributory cause to his condition.

(g) The Trial Court erred in not finding that the Respondent failed to comply with the Slop Chest Statute and that said failure gave rise to a cause of action in favor of the Petitioner and it erred in not awarding the Petitioner compensatory damages.

E.

SUMMARY OF ARGUMENT.

I. The proper meaning and construction of the Slop Chest Statute gives rise to an important question of Federal Law, which has not been, but should be, settled by this Court.

II. The Slop Chest Statute has never been judicially interpreted or construed.

III. The decision of the Trial Court is not in accord with applicable decisions of this Court in related cases.

IV. The Slop Chest Statute imposes a non-delegable duty upon the shipowner.

V. The Slop Chest Statute is a safety statute within the meaning of Title 45 USCA §53, in an action brought under the Jones Act 46 USCA §688.

VI. Failure to comply with the Slop Chest Statute constitutes negligence as a matter of law.

VII. The Trial Court erred in measuring the Respondent's duty to comply with the Slop Chest Statute by the provisions of Operations Regulation No. 13 promulgated by the War Shipping Administration.

VIII. The Trial Court erred in its conclusion that Respondent substantially complied with the Slop Chest Statute.

IX. The Trial Court erred in its finding that the Petitioner has not convincingly shown that his Tuberculosis was proximately caused by getting wet feet due to not getting rubber boots, or that the absence of the latter, was a material contributory cause to his condition.

X. The Trial Court erred in not finding that the Respondent failed to comply with the Slop Chest Statute and that said failure gave rise to a cause of action in favor of the Petitioner and it erred in not awarding the Petitioner compensatory damages.

F.

ARGUMENT.

POINT ONE.

The proper meaning and construction of the Slop Chest Statute gives rise to an important question of Federal Law, which has not been, but should be, settled by this Court.

The proper meaning and construction of this statute is not a matter affecting only the parties to this cause, but it directly affects every officer and every seaman making a foreign or inter-coastal voyage on an American merchant vessel, and it likewise affects and concerns all owners and operators of American merchant vessels making foreign or inter-coastal voyages.

At first glance it may appear that your Petitioner is asking this Court to review the findings of fact which were affirmed, per curiam, by the Circuit Court of Appeals. However, upon closer study of the record, it will readily become apparent that the real basis of the Court's conclusions are predominantely conclusions of law. A similar situation was before this Honorable Court in the case of Mahnich vs. Southern Steamship Company, 321 US 96, where this Court said:

> "Ordinarily, we do not, in admiralty, more than in other cases review concurrent findings of fact of two courts below. Here, however, both courts below, holding themselves bound by Pinar Del Rio, 277 US 151, held as a matter of law, that the staging was seaworthy despite its defect. That conclusion of law is reviewable here."

We respectfully submit that in the case at bar, the trial Court's findings of law and fact have no basis either in law or in fact, as will be shown by a detailed discussion of the points of this Brief.

POINT TWO.

The Slop Chest Statute has never been judicially interpreted or construed.

We have not been able to find any case either in the Federal Courts or in the State Courts, which has ever judicially interpreted or construed this statute. This Court has however, at least on two occasions, announced the purpose of the statute. In the case of Iroquois, 194 US 240, Mr. Justice Brown, speaking for this Court said:

> "* * * for the further protection of seamen, vessels of the class of the Iroquois are compelled by law to be provided with a chest of medicines, with such anti-scorbutics, clothing and slop chests as the climate, particular trade and the length of the voyage may require. Comp. Stat. secs. 4569, 4572-4573."

In Aguliar vs. Standard Oil Company, 318 US 724, 727, this Court stated as follows:

> "From the earliest times, maritime nations have recognized that unique hazards emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements, and the limitations of human adaptability to work at sea, enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time, combine with the constant shuttling between unfamiliar ports to deprive the seamen of the comforts and opportunities for leisure, essential for living and working, that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extra-ordinary hazards and limitations of ship life.
>
> Accordingly, with the combined object of encouraging marine commerce and assuring the well-being of seamen, maritime nations uniformally have imposed

broad responsibilities for their health and safety upon the owners of ships. In this country these notions were reflected early, and have since been expanded, in legislation designed to secure the comfort and health of seamen aboard ship, hospitalization at home and care abroad. The statutes are uniform in evincing solicitude that the seamen shall have at hand the barest essentials for existence. They do this in two ways. One is by recognizing the shipowner's duty to supply them, the other by providing for care at public expense. The former do not create the duty. That existed long before the statutes were adopted. They merely recognize the preexisting obligation and put specific legal sanctions, generally criminal, behind it. * * *."

In a note to this case (p. 728) the Court gives numerous instances of "legislation designed to secure the comfort and health of seamen aboard ship", and among them the Court includes and cites the Slop Chest Statute, 46 USCA §670, as the provision which provides that certain basic clothes be furnished by the shipowner.

POINT THREE.

The decision of the Trial Court is not in accord with applicable decisions of this Court in related cases.

As has been stated previously, while this statute has never fully been judicially interpreted or construed, nevertheless as has been shown under the preceding Point Two, this Court has on two previous occasions decided that the statute was passed for the further protection of seamen and for the health and safety of seamen.

The Trial Court stated (R. 8) that:

"The evidence is not very full or satisfactory with respect to the nature and purposes of and customary practice regarding the composition of the Slop Chest;

but from such evidence as there is in the case regarding it, I find there was a substantial compliance with the statutory requirement". * * *

"It seems clear enough that the contents of the Slop Chest are intended primarily for the convenience of the seamen and for replacement in emergency situations of articles of clothing. By the long established custom seamen are expected to and do provide their own gear or clothing when they engage upon a ship. It seems obvious that it could not reasonably have been intended by Congress that merchant ships with their limited space other than for cargo, would be required to carry a large assortment of articles of clothing, sufficient at all times to supply any and every seaman with any and all articles of clothing which he might desire to purchase in every size suitable for any and every member of the crew of possibly fifty men" (R. 10).

The only evidence in this case on which the Court could possibly have based its conclusion was the following:

"(Captain Keith) As a general rule the sailor brings his gear on board and replenishes it from the Slop Chest. He might be missing an article or two, and he would replace it from the Slop Chest such as wearing apparel, things he usually gets from the Slop Chest (R. 73).

(The Court) Is there established custom or practice or rule or regulation, so far as you know, as to the volume or quantity of rubber boots, for instance, that would have to be stocked in the Slop Chest? (R. 74).

(The Witness) Well, the law says something about having a full complement, but I have never been on any ship that carried forty pairs of boots or thirty six pairs of boots. We had on the vessel twelve pairs of boots, and, I think, forty-two pairs of shoes (R. 74).

(The Court) What is the expectation or custom with regard to seamen on boats? Do they supply their own clothing when they come on the ships or are they supplied by the ship? (R. 91).

(Captain Jordan) Customarily, the officers have their own clothing. In my experience in going to sea, I always carried my own clothing. I don't think I ever bought any boot or pair of boots or shoes out of the Slop Chest. Maybe I would buy a couple of handkerchiefs or cigarettes or chewing gum, but I don't recall any time I ever bought anything out of the Slop Chest in all these years, but I carried my own boots and my own oil-skins with me; whereas, the unlicensed personel, they run short of money sometimes in port, and they sell their boots, or even pawn them for something, and go on the ship, and any equipment which is necessary, the ship supplied these items. But the ship's officers usually are more satisfactory employees, and more reliable, and they carry their own equipment with them in a great number of cases" (R. 91).

It is respectfully urged that the Trial Court had no basis as a matter of law or fact for its conclusions regarding the purpose of slop chests. It certainly cannot be said that the Court had any evidence before it upon which it could justify a finding which is not in accord with the decisions of this Honorable Court as to the purpose of the Slop Chest.

In order to carry out the purposes of the statute it should be given a liberal interpretation and not a narrow and restricted one as the trial Court did in this case. Very often seamen and officers do not know where a vessel is going to and therefore cannot have proper gear when they first board the ship; quite often they join a ship just before sailing time, without even having an opportunity to procure their own gear ashore, and they have a right to assume that the vessel will be properly equipped with *"a complement of clothing for the intended voyage for each seaman employed."*

This Court in the case of Yankee Arrow, 305 US 424, stated that the traditional policy of affording adequate protection to seaman required the exaction of:

> "* * * a high degree of responsibility for owners for the seaworthiness of vessels and the safety of their appliances." * * *
>
> "It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end".

POINT FOUR.

The Slop Chest Statute imposes a non-delegable duty upon the shipowner.

This duty is similar to the duty, at common law, imposed upon an employer to furnish his employee a safe place to work; and it is similar to the duty which the law imposes upon a shipowner to furnish a seaworthy vessel. In either case, the duty cannot be delegated to an independent contractor, agent or fellow servant, so as to relieve the owner or employer from his responsibility. This Court reaffirmed this doctrine in the case of Mahnich vs. Southern Steamship Company, supra, as follows:

> "In thus refusing to limit by application of the fellow-servant rule, the liability of the vessel and owner for unseaworthiness, the Court was but applying the familiar and then well established rule of non-maritime torts that the employers duty to furnish the employee with safe appliances and a safe place to work is non-delegable and not qualified by the fellow-servant rule * * *."
>
> "It would be an anomaly if the fellow-servant rule, discredited by the Jones Act as a defense in suits for negligence were it to be resuscitated and extended to suits founded on the warranty of unseaworthiness, so as to lower the standard of the owners' duty to furnish safe appliances below that of the land employer."

The Respondent cannot be relieved from responsibility arising out of its failure to comply with the Slop Chest Statute by delegating that duty to its operating agent any more than it could relieve itself from responsibility by delegating the duty to a fellow-servant of the Petitioner. It is a duty imposed on the ship from which it cannot relieve itself. It is one of the obligations it assumes as an owner or operator of American vessels. The liability is a statutory one and it is not based on the exercise of reasonable care, but is an absolute statutory requirement, just as is the requirement that a vessel be seaworthy an absolute one. As this Court stated in the case of Seas Shipping Company vs. Sieracki, 66 Supreme Court Reporter 872, after discussing the economic philosophy of the liability being cast upon the vessel regardless of fault upon the theory that the steamship owner is in a position to distribute the loss in the shipping community which receives the services and should bear its cost, concluded as follows:

> "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been paramount influences dictating the ship owners' liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character."

Point Five.

The Slop Chest Statute is a safety statute within the meaning of Title 45 USCA §53, in an action brought under the Jones Act 46 USCA §688.

This action was brought under the Jones Act 46 USCA §688 which reads, in part, as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

As part of the Federal Employees Liability Act in the case of railway employees, Title 45 USCA §53, provides that:

> "* * * no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

We have already shown under Point Two that this Court has decided that the Slop Chest Statute was enacted for the health and safety of seamen, the Iroquois, supra; Aguilar vs. Standard Oil Company, supra. Therefore the trial Court should have found that the Slop Chest Statute is a safety Statute and not only should it have been liberally construed, but the alleged contributory negligence of the Petitioner should not have been considered as any defense whatsoever. In a note (p. 728) to the Aguilar decision, the Supreme Court cites the following Acts of Congress as having been passed "to secure the comfort and health of seamen aboard ship":

> "Act of July 20, 1790, c. 29, sec. 8, 1 Stat. 134; Act of June 7, 1872, c. 322, sec. 41, 17 Stat. 270; 46 Mason's U. S. C., secs. 666, 667, requiring that ships carry a minimum supply of medicines and anti-scorbutics. Act of July 20, 1790, c. 29, sec. 9, 1 Stat. 135; Act of June 7, 1872, c. 322, sec. 36, 17 Stat. 269; Act of Dec. 21, 1898, c. 28, sec. 12, 30 Stat. 758; R. S. 4565; 46 Mason's U. S. C., secs. 661, 662, requiring that ships carry suffi-

cient and adequate stores and water for the crew. See also 17 Stat. 277, 46 Mason's U. S. C., sec. 713; Act of June 7, 1872, c. 322, sec. 42, 17 Stat. 270, R. S. 4572; Act of June 6, 1884, c. 121, sec. 11, 23 Stat. 56; Act of Dec. 21, 1898, c. 28, sec. 15, 30 Stat. 759; 46 Mason's U. S. C., secs. 669, 670, providing that certain basic clothes and heating facilities be furnished by the shipowner; 46 Mason's U. S. C., secs. 672-672 (c), 673, prescribing qualifications and quotas for crews, and watch divisions."

It is interesting to note that the Slop Chest Statute which is sec. 670 of Title 46 is in the midst of the statutes beginning with sec. 661 and extending up through 673. It is obvious that all of these statutes while not enacted at the same time are all in the same class or group and should be uniformally interpreted.

This Court in speaking of sec. 672 and 673 in the case of O'Hara vs. Luckenbach, 269 U. S. 364 stated that the general purpose of these sections is not only to safeguard the welfare of the seamen as workmen, but as set forth in the title "to promote safety at sea."

Sec. 666 was construed in the case of The Rence, 46 Fed. 805, where it was held that the ship was liable even though the Master carried the necessary lime juice, etc. on the vessel and he failed to serve it to them because they themselves preferred to receive coffee instead. The Court stated:

> "The provisions of the statute in this respect are mandatory. * * * The consent of the men to a violation of a positive provision of law can in no respect modify the Captain's liability for his offense." * * *

Sec. 669 (Warm and Safe Room) was construed in the case of Rooker vs. Alaskan Steamship Company, 185 Wash. 71, Certiorari denied by this Court, 299 U. S. 552, where the Supreme Court of the State of Washington held that sec.

669 is a safety statute within the terms of 45 USCA §53, and that the violation of that section by reason of which the seaman developed Tuberculosis constituted negligence as a matter of law.

It seems therefore too clear for argument that the Slop Chest Statute is a safety statute, and that the Trial Court erred in not so finding.

POINT SIX.

Failure to comply with the Slop Chest Statute constitutes negligence as a matter of law.

Even if this Honorable Court should find that the Slop Chest Statute is not a "safety statute" within the provisions of the Federal Employees Liability Act (45 USCA §53), which was made applicable to actions brought by seamen against their employer under the Jones Act (46 USCA §688), nevertheless it is indisputably a positive and absolute statutory requirement, the violation of which amounts to negligence as a matter of law. It is no answer, in a case of a violation of a statutory requirement to say that the violator exercised reasonable care to comply with the statute, unless the statute itself only requires the exercise of reasonable care. In the absence thereof, mere violation of a statutory requirement amounts to a breach thereof as a matter of law.

POINT SEVEN.

The Trial Court erred in measuring Respondents' duty to comply with the Slop Chest Statute by the provisions of Operations Regulation No. 13, promulgated by the War Shipping Administration.

The trial court held in speaking of Slop Chests that (R. 10):

> "There is no evidence as to the origin of the term 'slop chest'; but the very name would tend to indicate that it was intended to include miscellaneous articles for the convenience of seamen or as a surplus store for only emergency use. The limitation as to wholesale prices would also seem to indicate that it was for the benefit of seamen with respect to the cost of articles. And, as above noted, the regulations provide for the exercise of only 'reasonable care and diligence in the compliance with the owner's obligations'."

We submit that we have already shown that the Slop Chest Statute was enacted not merely for the convenience of seamen, but principally for the protection, health and safety of seamen. The Iroquois, supra; Aguilar v. Standard Oil Co., supra, and therefore should be liberally construed in furtherance of the objects sought to be attained. Furthermore, the respondent cannot lessen its liability under the statute by any agreement which it might make with its General Agents, under which it requires them to *"exercise reasonable care and diligence in compliance with the owner's obligations"* to purchase for account of the WSA *"the items required for the intended voyage"*, and which shall be delivered *"to the custody of the master"*, and the latter shall sell any of the contents of the Slop Chest to *"any or every seaman applying therefor."* The duty devolving upon the owner is absolute and mandatory in order

to carry out the purpose and objectives of the statute. It cannot contract away its responsibility therefor. If this were a suit between the Respondent and one of its general agents then, of course, the terms of its agreement with the latter would determine the liability of the General Agent to the Respondent; but as between the Respondent and an officer or seaman of one of its vessels the test of Respondent's responsibility is the statute itself.

POINT EIGHT.

The Trial Court erred in its conclusion that Respondent substantially complied with the requirements of the Slop Chest Statute.

The morning after the vessel sailed from Savannah on her maiden voyage the Petitioner went to the purser who had charge of the Slop Chest and tried to purchase a pair of rubber boots. The size which he wore was 11, but of course he could have worn size 12 as well. There were no rubber boots in the slop chest large enough to fit him, as they did not have any sizes 11 or larger (R. 28). He actually tried on all of the larger sizes to see if he could get his feet into them, but there were none there that he could actually get his feet into (R. 108, 109). Although he does not know the exact sizes which were in the Slop Chest he does know that they had no size 11 or size 12 and he did not think they had even size 10 (R. 108, 109). Mr. Fulton, the purser of the vessel, who was produced by the Petitioner, testified that Mr. Smith came to him shortly after the vessel left Savannah and attempted to purchase a pair of rubber boots, and that Mr. Smith in his presence tried on every pair that was in the Slop Chest and there were none that he could wear at all (R. 80, 81). *There was absolutely no evidence whatsoever to contradict this testimony of the Petitioner and the purser.* As a matter of fact, the trial

court found as a fact that he *"was unable to find in the assortment of twelve pairs a pair which would fit him"* (R. 5).

The Respondent produced the master of the vessel, Captain Keith. He did not know anything about what sizes there were contained in the slop chest. The Respondent also produced the Port Captain, Captain Jordan, who was in the employ of the International Freighting Corporation which operated this vessel, as one of the General Agents of the WSA. He was employed sometime in 1940, and his only experience with slop chests was while acting as port captain for his employer. He testified that of his own actual personal knowledge he does not know what sizes of rubber boots there were in the slop chest (R. 94), although he did admit that there should have been sizes ranging from 7 to 11 and that there should have been at least two pairs of each size (R. 90); that his department sent the order to the ship chandler that supplies the slop chests of vessels operated by them, and he just assumed that they would have the proper sizes sent to the vessel (R. 90, 94). He further testified that when an order is sent to their ship chandler it is assumed that they will send sizes from 7 to 12 (R. 94), and that if he had known that they were not sending sizes up to and including 12 he would not have thought that they were filling the order properly (R. 95). The only other evidence which the Respondent offered on the subject was the testimony taken *by deposition* of Maurice Muney, a partner of the Seven Seas Supply Company, who had been supplying slop chests of vessels operated by the International Freighting Corporation (R. 96). He admitted that when they receive an order for twelve pairs of rubber boots it is their practice to supply a variety of sizes including two of size 10 and two of size 11 (R. 97, 104). It is obvious from a reading of his deposition that he was

testifying as to the customary practice of his company and not as to any definite recollection of the particular order involved in this case. He admitted that the Seven Seas Supply Company have records of every order that they have filled, but that he had not examined the records pertaining to the order for the slop chest for the vessel in this case (R. 103). *The Respondent did not produce those records.* It is clear from his deposition that he had no definite recollection of the sizes supplied in this case any more than he remembered any other orders that he filled on that same day (R. 106, 107). He did admit, however, that in outfitting a new ship "you have got to give her enough to take care of practically every one" (R. 98).

It is quite clear that there was no proof whatsoever offered which could have formed a basis for a finding that the Respondent actually complied with the requirements of the Slop Chest Statute. *As a matter of fact, counsel for the Respondent in his opening statement admitted that they themselves do not know what sizes were in the slop chest, when he stated as follows* (R. 21):

> "(Mr. Morison) That was something I intended to find out from the Libellant, whether there was a larger size or a closer size to his. I have not got that information and I have been unable to get it. Apparently the Company has no information of what sizes were in the slop chest. They have the number of pairs when the voyage started and the number when the voyage ended, but no information as to sizes."

It might also be noted that the trial court itself, after the Respondent had completed its case, stated (R. 107):

> "I am quite satisfied that the other side have not proven in any certain way that they had a No. 11 in that slop chest, but they do show that in the ordinary course of events that would have been expected from the assortment that was supplied. It is quite obvious

> that you can't expect in a situation like that to find a minute check of every article as to sizes. It is not just practicable * * *. I am satisfied the Plaintiff could not get a pair of boots to fit him according to his specifications. That is all there is to it."

The fact that they had expected to get the proper sizes and did not get them does not amount to a full compliance with the requirements of the Statute which requires "*every vessel—shall also be provided with a slop chest, which shall contain a complement of clothing for the intended voyage for each seaman employed* * * *." There simply was not any probative evidence in the case to contradict the full, clear, express and positive evidence of the Petitioner and the purser that he could not obtain a pair of rubber boots of a size to fit him, which size was the customary size which one would expect to find in a ship's slop chest. We further respectfully urge upon this Honorable Court that the weight to be given to the testimony of Maurice Muney, which was given by deposition, is not governed by the findings of the trial court, since he did not testify in person, and this Honorable Court has the unrestricted right to read his deposition and give it such weight as this Court sees fit, which we respectfully submit to be nil, because he was obviously testifying to what the customary procedure of his Company is and not to any actual recollection.

Respondent, in reply to the Petitioner's claim that they did not have a sufficient and proper size of rubber boot in the slop chest, contended that the Petitioner should have worn his lifesaving suit which was supplied by the vessel, and that that would have protected him from the seas. We do not desire to burden this Honorable Court with a detailed discussion of the impracticability and the danger of wearing a lifesaving suit, which weighs 12½ pounds

(R. 96), and which has to be worn over a lifesaving jacket, all of which has to be worn over the regular clothing of a seaman, and which lifesaving suit is weighted at the heels in order to keep the wearer afloat in the water in an upright position. It is conceivable that such a suit could be worn for a short period of time; but to conceive of a man wearing it for eight hours or more each day and attempting to do his regular work aboard ship is simply preposterous. It would do more to endanger the seaman's health than not wearing it. Furthermore, these suits were not placed aboard ship to be worn for work but only to be worn in case of emergency such as a torpedoing of the vessel, or sinking of the vessel, so that the seaman would have these suits to assist him in surviving the perils of the sea or to protect him against freezing and other conditions brought about as a result of exposure in an open raft or lifeboat. (R. 100, Res. Ex.—Wartime Safety Measures, April, 1944). If they were to be worn on other occasions eventually they would be worn out and they might not be available in case of emergency, which is the only purpose for which they were placed on American merchant vessels during World War II.

The Trial Court itself commented that they should not be worn generally (R. 119).

> "(The Court) Oh, well, that seems to rule it out. The main point is that the suits are not convenient to wear and probably should not be worn generally under ordinary working conditions, and I think that is quite evident in the case."

The Trial Court made much of the fact that the Petitioner himself signed a certain paper called "Requisition" and that he, the Petitioner, did not specify in the requisition the sizes of the rubber boots that were to be sent to the vessel, knowing, as he must have known, that he him-

self would want to purchase a pair of rubber boots (R. 6, 11, 12). In the first place the requisition did not show any sizes, and the Petitioner expected that they would have proper sizes, as he had always, in all of his experience, purchased rubber boots from ships' slop chests. Secondly, and what is more decisive of the issue, is that actually the circumstances surrounding his putting his signature on the requisition sheet are as he explains them, namely, that he was signing for the receipt of all of the items that were then being delivered to the vessel, which included not only the articles for the ship's slop chest, but also for the medicine chest, engineers supplies, wireless operators supplies, etc. (R. 112-116). *Furthermore, the order for the slop chest was actually placed and filled before the Petitioner joined the vessel.* If this Honorable Court will examine the Respondent's Exhibit No. 2 it will find the requisition sheet which was offered in evidence and it will be seen that it is dated October 18th, 1944 and that it is in confirmation of a verbal order given to Mr. Muney of the Seven Seas Supply Company on October 18th, 1944 and that it was to be shipped from New York so as to arrive in Savannah on October 25th, 1944. The Petitioner was not employed on this vessel until October 22nd, 1944 when he was first introduced to Captain Keith in Baltimore, and they both left Baltimore on October 24th, 1944 (R. 67). It is simply futile to attempt to argue that the Petitioner himself was responsible for the lack of proper sizes having been designated in the requisition for the ship's slop chest. The order had been placed, filled and shipped before he had any idea that he would be employed to ser e on this vessel. Furthermore, he had no control and nothing whatsoever to do with the ship's slop chest either before or after it was delivered on board as that is in complete control of the Master and the latter had desig-

nated the Purser to have charge of it on this ship as is the customary procedure (R. 73, 75, 76, 86, 111).

For the reasons given we submit that the trial court erred as a matter of law and also as a matter of fact in its conclusion that the Respondent substantially complied with the requirements of the Slop Chest Statute.

POINT NINE.

The Trial Court erred in its finding that the Petitioner has not convincingly shown that his tuberculosis was proximately caused by getting wet feet due to not getting rubber boots or that the absence of the latter was a material contributory cause to his condition.

It should be noted at the outset that the Petitioner was examined by a physician on behalf of the Respondent and he was found satisfactory and accepted for service (R. 22). It was also found by the Court as a fact that he

> *"passed a sufficient physical examination for service and apparently was not then suffering from tuberculosis and had had no serious prior illness"* (R. 4).

He experienced no symptoms of fatigue, loss of weight, loss of appetite or fever prior to his joining this ship. After he unsuccessfully tried to purchase boots he contracted a cold and his feet were wet almost continuously thereafter during the voyage when he worked on the bridge and also down below which he did daily for eight hours or more. The cold kept on and he developed a constant cough which interfered with his rest and with his sleep (R. 34, 35, 50-52). The trial court also found that he had developed a cold at the beginning of the voyage "which continued to grow worse during the voyage" (R. 5). It is apparent to even a lay mind, without the benefit of medical testimony, that such a course of events could very easily and probably would break down a man's health and cause dormant and

inactive tubercular germs, which are present in the bodies of 80 to 90 per cent of the population, to become lighted up and activated into an active tuberculosis. The evidence is uncontradicted that while he had suitable wet-weather clothing from his head down to just above his knees, he did not have any suitable protection for his feet until the last few days of the voyage, and that for almost the entire voyage across to England and return he would be working in low-cut conventional shoes, which were therefore constantly wet while he was on the bridge of the ship (R. 31-35, 50-52); and when he was not working on the bridge of the ship he was working down below in bilges, etc., at which time he also would be standing in water several inches deep. The Petitioner produced Dr. Victor F. Cullen, an eminent specialist in the field of tuberculosis, who has been superintendent of the Maryland State Sanitarium since 1908, Past President of the Medical & Chirurgical Faculty, Past President of the National Tuberculosis Association, member of the American Trudeau Society, and a member of the American Medical Association, and who was passed by the Board of National Examiners on Internal Medicine and on the subject of tuberculosis. Dr. Cullen was personally familiar with the case of Mr. Smith and personally treated him at the Sanitarium. He testified that the lighting up of the tuberculosis in this case was possibly due to the wetting which Mr. Smith got when he was subjected to a drenching and wetting and working while he was wet, in crossing from Savannah. The only evidence in the case of any drenching, wetting, and working while wet, was with reference to his feet and being compelled to work in wet feet because of his inability to obtain rubber boots. Counsel for the Respondent so understood the Doctor's testimony, as is shown by the question he put to the Doctor on cross-examination (R. 63):

> "You said, based on the history that the man told you that he had been on this vessel and had been in a storm and had gotten his feet wet and got a cold shortly after leaving Savannah about the middle of November, that that made it in your mind possible that this resulted * * *."

The trial court in its opinion stated that the Doctor testified:

> "That from the history of the case as given to him by the Libellant his condition might have been caused by his exposure on the ship's bridge during wet and rough weather without wearing rubber boots * * *. When first questioned his answer was that it was possible. Under more pointed questions he said he thought it was reasonably probable" (R. 13).

An examination of the doctor's testimony will clearly show that he expressed the opinion that having had to work without rubber boots and with wet feet, and having contracted a cold at the early part of the voyage which continued to grow worse, and with the symptoms complained of and with his developing a cough which interfered with his rest and sleep, it all would be conducive and probably did light up an inactive tubercular infection and caused it to become an active disease (R. 58, 59, 62). The doctor further testified that if a man has a cold and then works for four hours at a stretch with wet feet, that it is injurious to his health (R. 62); that if he developed a cough and it interfered with his rest and sleep that also would be injurious to his state of health (R. 62). He further testified that the post nasal drip or sinus trouble which the Petitioner had for ten years prior to his service on the ship had no relation to the lesion in his lung, because otherwise the lesion would have shown much more extensive progress. Furthermore, when he left the hospital there was no tubercle bacilli in his sputum, but he still had the post nasal drip and sinus condition (R. 64, 65).

Mr. Smith gave a history of having been subjected to medical examinations on every vessel that he served on, except a few small coastwise trips (R. 53, 65), and that he had never had tubercle bacilli in his sputum before. Dr. Cullen further testified that the most frequent causes of lighting up a quiescent tubercular condition are overwork and insufficient rest (R. 65, 66); and that catching a cold would be a very predisposing cause to light up a case of incipient or dormant tuberculosis (R. 66). *If catching a cold is a predisposing cause to light up a case of dormant tuberculosis, how much more apt is it to be lighted up when a man catches a cold and then continues to work in wet feet almost every day for eight or more hours each day for a period of almost two months.*

> "If the negligent actor is liable for another's injury which so lowers the other's vitality as to render him peculiarly susceptible to a disease, the actor is also liable for a disease which is contracted because of the lowered vitality." Restatement of the Law of Torts, §458, p. 1218.

The following illustration is given by the text writers:

> "A's negligence causes harm to B which seriously lowers B's vitality. In consequence of the lowered vitality B contracts tuberculosis. A is liable for B's tuberculosis, irrespective of whether it is a 'lighting up' of a dormant tubercular tendency, or is contracted by B who had previously never suffered from tuberculosis or shown any tubercular tendency."

Can there be any doubt that working under the conditions which the Petitioner testified to, it lowered his resistance as to allow the inactive germs of tuberculosis to become active and overcome his system? To ask the question is to answer it. Moreover it need not be shown that the conditions complained of were the sole cause of his illness

for, as it was said in the case of Rey vs. Colonial Navigation Company, 116 Fed. 2d. 580 (CCA 2):

> "Where a defendant's negligence is not the sole cause of the injury but is accompained by other concurring causes, the defendant is not for that reason alone absolved from liability. Miller vs. Union Pac. Ry., 290 U. S. 227, 235, Restatement of Law of Torts, §432."

The Respondent offered no evidence whatsoever to contradict the testimony offered by Dr. Cullen as to proximate cause. They had the Petitioner examined by a doctor before they accepted him for employment, *yet they did not produce this doctor to testify.* The Respondent had the Petitioner examined by a tuberculosis expert shortly before the trial (R. 107, 108), presumably for the purpose of obtaining an opinion from him as to proximate cause, etc., and also to testify in Court, *yet they did not produce him to testify.* The doctor that they had examine the Petitioner was Dr. E. H. Tonolla who is reported as a tuberculosis expert as chief of the chest clinic of the University of Maryland in the case of Appliance Corp. vs. Reimsnyder, 177 Md. Repts. 280. Counsel for the Petitioner called upon Respondent to produce the report of their expert, Dr. Tonolla, before the case was submitted to the trial court, but the Respondent failed and refused to produce the report (R. 125). We, therefore, submit that there was no evidence whatsoever to contradict the clear and satisfactory evidence offered by the Petitioner and Dr. Cullen as to proximate cause. The trial court itself admitted that there was evidence legally sufficient to find proximate cause (R. 15). In addition to this we submit that the trial court should have as a matter of law drawn the inference that by reason of the failure of the Respondent to produce its medical testimony and by reason of their failure and refusal to produce the report of their expert when called

upon to do so by the Petitioner, that had they thus produced the medical testimony and/or report that it would have been helpful and consistent with the Petitioner's contentions as to proximate cause. Preston vs. Western Union Telegraph Company, 250 Fed. 480, affirmed 254 Fed. 299; Cer. Den., 248 U. S. 585; Standard Transportation Company vs. Wood Towing Corp., 64 Fed. 2d. 282; M. E. Luchenback, 174 Fed. 265, affirmed 178 Fed. 1004; Bronx Barge Corp. vs. Connally, 35 Fed. 2d. 294.

The most that can be said on behalf of the Respondent is that Dr. Cullen was unable to answer a long cumbersome and involved hypothetical question (R. 60, 61). It is perfectly clear, however, that his inability to answer that question cannot override the clear, express, simple testimony given by him throughout his examination on the subject of proximate cause.

We therefore urge that the trial court's conclusion that the Petitioner has not convincingly shown proximate cause is an error of law, as it is inconceivable to your Petitioner how the trial court could have arrived at that conclusion, unless it just arbitrarily refused to accept the testimony on the part of the Petitioner and Dr. Cullen. There was no evidence offered by the Respondent which the court could believe or disbelieve. *An examination of the Trial Court's findings of facts and opinion of law will disclose that it actually found as facts all the essential elements that go to prove proximate cause. And finally the trial court did not draw the inference which as a matter of law it should have drawn from the Respondent's failure to produce their medical expert and/or his report, particularly when it was specifically called for by Petitioner's counsel.*

POINT TEN.

The Trial Court erred in not finding that the Respondent failed to comply with the Slop Chest Statute and that said failure gave rise to a cause of action in favor of the Petitioner, and it erred in not awarding Petitioner compensatory damages.

We respectfully submit that we have shown that the Slop Chest Statute was enacted for the health, safety and welfare of American seamen, and that the Respondent failed to comply with the Statute, that its failure was negligence as a matter of law, that the said failure was the proximate cause of the Petitioner's illness and disability, and that therefore the Petitioner should have been awarded compensatory damages. We therefore urge upon this Honorable Court that it grant the Petitioner's prayer for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Fourth Circuit, and that the judgment of the latter Court affirming, per curiam, the action of the trial court be reversed.

SOL C. BERENHOLTZ,
Attorney for Petitioner.

INDEX

CITATIONS

745856—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1373

OSCAR K. SMITH, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Maryland (R. 2–20) is reported at 66 F. Supp. 933. The *per curiam* opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 128), adopting the District Court's opinion, is reported at 159 F. 2d 247.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 30, 1947 (R. 129). The time for filing a petition for a writ of certiorari was extended to and including May 15, 1947

(R. 131), and the petition was filed May 15, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the slop chest statute (46 U. S. C. 670) imposes absolute liability upon the owner of a vessel for the consequences of failing to supply, from the chest, rubber boots which would fit a particular seaman, where the owner exercised reasonable and customary care in outfitting the chest with an assortment of rubber boots.

2. If so, whether petitioner's contributory negligence in failing to take steps to prevent disability consequent upon the respondent's failure to supply rubber boots bars him from recovering damages.

3. Whether petitioner's disability was proximately caused by the respondent's alleged breach of obligation under the slop chest statute.

STATUTE INVOLVED

The pertinent statutory provision concerning slop chests (Section 11 of the Act of June 26, 1884, c. 121, 23 Stat. 56, 46 U. S. C. 670) is as follows:

> * * * every vessel mentioned in [section 666 of Title 46] shall also be provided with a slop chest, which shall contain

> a complement of clothing for the intended voyage for each seaman employed, including boots or shoes, hats or caps, underclothing and outer clothing, oiled clothing, and everything necessary for the wear of a seaman; also a full supply of tobacco and blankets. Any of the contents of the slop chest shall be sold, from time to time, to any or every seaman applying therefor, for his own use, at a profit not exceeding 10 per centum of the reasonable wholesale value of the same at the port at which the voyage commenced. And if any such vessel is not provided, before sailing, as herein required, the owner shall be liable to a penalty of not more than $500. The provisions of this section shall not apply to vessels plying between the United States and the Dominion of Canada, Newfoundland, the Bermuda Islands, the Bahama Islands, the West Indies, Mexico, and Central America. * * *

STATEMENT

Petitioner's action is brought against the United States, under the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U. S. C. 741–752) and the Jones Act (Act of March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185, as amended, 46 U. S. C. 688), for damages for disease asserted to have resulted from alleged failure to comply with the slop chest statute, *supra*, pp. 2–3, aboard a Liberty ship owned by the United

States and operated by the War Shipping Administration (R. 2–3). The case was tried, without a jury, by the District Judge, who made findings of fact which were adopted by the Circuit Court of Appeals (R. 4–7, 13–16, 128).

Petitioner was employed as Acting Chief Mate aboard the S. S. *Milton J. Foreman* on her maiden voyage, in November and December 1944, from Savannah, Georgia, to Liverpool, England, and returning to New York. He was hired in October in Baltimore, and proceeded to Savannah to await the ship's sailing in the middle of November (R. 2, 4). He brought the customary clothing aboard, except for rubber boots and other rough weather gear which he claims he expected to purchase, if necessary, from the slop chest (R. 5, 25–27, 38). Almost immediately after sailing, the vessel ran into heavy weather which continued throughout the eastward crossing (R. 4–5). Petitioner, a large man six feet four inches tall and weighing about 200 pounds (R. 5), who testified that he normally wore size 11 (R. 28, 108), sought to purchase a pair of rubber boots from the slop chest, but was unable to find a pair which would fit him in the chest's assortment of twelve pairs (R. 5).

The War Shipping Administration's Operations Regulations No. 13, dated October 7, 1942, required the Administration's General Agents to "provide a slop chest for the benefit of seamen

aboard each vessel as soon as it enters service. The Master shall submit to the General Agent a requisition for the items required for the general voyage and the General Agent shall purchase same for account of the War Shipping Administration. * * *. It shall be the responsibility of each General Agent and Master to exercise reasonable care and diligence in the compliance with the owner's obligation herein and in protection and disposition of the contents of the slop chests" (R. 5–6). In this case, the General Agent's customary routine with respect to providing slop chests was followed. A list of some 60 different items (*e. g.*, caps, coats, drawers, brushes, cigars, pipes, tobacco, chewing gum, playing cards) was drawn up, with the number of each item specified (R. 6).[1] Twelve pairs of

[1] The slop chest requisition was dated October 18, 1944, signed by the petitioner, and approved by the Master as well as by the General Agent's port captain (R. 6, 114). Petitioner testified that he probably signed the document, as a formality, when the supplies were delivered aboard ship, and that he had nothing earlier to do with the order (R. 112–116); and he argues, in his petition (Pet. 38), that he could not have signed it on October 18 since he was not hired, in Baltimore, until a few days thereafter. There was testimony, however, by the port captain that the list was submitted to the Master and the officers for their inspection and approval before it was filled (R. 87–89, 93), and the District Court apparently concluded that petitioner actually saw the list before it was submitted for filling, either on October 18 or thereafter, and had the opportunity to include an order for large-size boots which would fit his own feet (R. 6, 11–12, 17). In any case, even if he first knew of the order when the

"boots, rubber, hip" were called for; neither this item nor the other items of wearing apparel specified the sizes to be furnished, but there is neither legal requirement nor custom that this be done (R. 6). Twelve pairs were ordered because experience indicated that number to be more than sufficient for the complement of the ship (R. 87–88, 89–90), and there is no intimation that a greater number was normally carried by other similar vessels (R. 11). The General Agent's representative uniformly understood that the supplier would furnish various sizes, ranging from six or seven to eleven or twelve (R. 90, 94, 95). The order was filled by the General Agent's usual New York supply house, under the personal supervision of the manager, who testified that it was his invariable custom, in the absence of detailed specification of sizes by the purchaser, to supply an assortment which consisted, in the case of an order for twelve pairs, of two 7's; three 8's; three 9's; two 10's; and two 11's (R. 6–7, 97–98, 104–105). Petitioner introduced other testimony that it was customary for slop chests to carry boots ranging from sizes six or seven to eleven and twelve, and sometimes fourteen (R. 120, 121, 122, 123).

---

supplies were received, he made no effort to check the boot sizes, "and although he remained in the port of Savannah for several weeks before the ship sailed he made no effort to purchase a suitable size of boots on shore before sailing" (R. 12).

Unable to secure boots to fit him from the chest, the petitioner used his ordinary low-cut shoes to stand his watches on the bridge and to perform other tasks in very wet weather (R. 5). He had developed a cold almost immediately after sailing, which continued to grow worse, and he lost weight and sleep, and at times suffered a slight fever (R. 5, 34–36). He did not complain to the captain about his lack of boots or other adequate foot covering, nor request the captain's help in securing a pair (R. 5, 16), nor did he make more than haphazard efforts on the eastward voyage to borrow boots from either the merchant marine or the naval gun crews (R. 29, 33). He was unable to buy a pair of rubber boots in Liverpool (R. 5, 32), but in the middle of the return trip he did obtain a pair through the Naval Gunnery Officer on the ship (R. 5, 36). At no time did he wear the rubber coverall suit provided for each seaman, primarily for use in case the ship had to be abandoned (R. 16). His testimony was that the suit was heavy, burdensome and hampering to work, and that he understood the Master to disapprove its use aboard ship (R. 16, 44–45, 52–53, 110, 118–119, 124); the Master of the ship testified to the contrary (R. 70–71, 72, 118), and the District Court inclined to accept the latter's view (R. 16, 17).

At the conclusion of the voyage, petitioner was about to sign for another trip when he was found, in the course of a routine medical examination, to

be suffering from "minimal" tuberculosis (R. 3). This necessitated his hospitalization for over a year, after which he was discharged with instructions to report periodically for examination and with the advice that very probably within one year his health would be sufficiently restored to enable him to resume his occupation (R. 3). Before shipping on the *Milton J. Foreman,* petitioner's health was generally good, though he suffered from a bad cough, which he attributed to a sinus condition (R. 4). The Superintendent of the State Tuberculosis Sanitarium, at which petitioner was treated, testified that the tubercular condition was probably recent in origin (R. 63), and might very well have been caused by exposure and wet feet during the voyage, though the witness oscillated considerably in his opinion of the degree of causative connection between petitioner's wet feet and the disease—from "possible" to "reasonably possible" to "reasonably probable" (R. 13, 58–59, 59–61).

The District Court concluded that petitioner was barred from recovery for three separate reasons: (1) the United States had substantially complied with the requirements of the "slop chest" statute and therefore there was no breach of any obligation on its part; (2) even if the statutory requirement were breached, the petitioner was contributorily negligent; and (3) in any case, petitioner did not sustain his burden of proving that the disease was proximately caused by the

failure to supply him with rubber boots. Accordingly, petitioner's claim for damage was denied, and judgment was entered for him in the sum of $1,980, representing maintenance and cure for the year following his discharge from the sanitarium (R. 1–2, 19–20).

On appeal by petitioner, the judgment was affirmed. The Circuit Court of Appeals remarked that "the facts are fully and correctly stated, together with the principles of law properly applicable, in the opinion of the District Court," and adopted that opinion as its own (R. 128).

ARGUMENT

The holding of both lower courts that the United States complied with the statutory requirement governing slop chests is clearly correct, and conflicts neither with the applicable principles of maritime law nor with any prior decision. In addition, there is more than adequate support for the concurrent findings of the two courts below that petitioner was contributorily negligent and that his injuries were not proximately caused by the alleged breach of owner's obligation. Accordingly, under the governing rule, these findings do not warrant review by this Court.

1. The lower courts concluded that the United States, through its General Agent, reasonably and substantially complied with the slop chest requirements of 46 U. S. C. 670, by ordering, according to the general custom, twelve assorted pairs of

rubber boots, with the reasonable and confident expectation that the sizes would vary from six or seven to eleven or twelve, and this would suffice for the needs of the crew. Petitioner does not, and cannot, deny that respondent's agent exercised all reasonable care and diligence to provide a proper slop chest, nor can he assert that long-standing customary practice in this respect was not followed here. The claim must be that the statute imposes upon the vessel's owner an absolute obligation to have available in the slop chest a pair of rubber boots for each member of the crew,[2] and that even the most diligent owner is responsible for the consequences of failure to supply boots to any seaman who may happen to call for them (cf. R. 12). But such a construction, imposing absolute liability without fault, is obviously at war with the uniform practice under the statute, as evidenced by the instant testimony (R. 74, 87–88, 89–90, 98, 101–102), as well as with the Act's reasonable interpretation. As the District Court said, "it could not reasonably have been intended by Congress that merchant ships with their limited space other than for cargo, would be required to carry a large assortment of articles of clothing, sufficient at all times to supply any and every seaman with any and all articles of clothing which he might desire to purchase in

[2] The statute imposes a penalty of a fine, not exceeding $500, upon the owner, if the vessel is not provided with the required slop chest. *Supra*, p. 3.

every size suitable for any and every member of a crew of possibly fifty men" (R. 10).

The purpose of the statute, which is one of those "designed to secure the comfort and health of seamen aboard ship" (*Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 728), is to furnish a store at which seamen may purchase ordinary supplies and replenish normal clothing, at reasonable prices, during the voyage (cf. R. 10, 73, 82–83, 88, 91). The statutes do not compel the owner to supply the crew's clothing,[3] and the practice is for each seaman, especially an officer, to outfit himself (R. 88, 91). The full purpose of the requirement is therefore fulfilled by making available, as was done here, a sufficient number and an adequate assortment of clothing and miscellaneous articles, which could reasonably be expected to satisfy the crew's demands. To read the provision as holding the vessel absolutely responsible for filling all clothing requests, no matter how unusual the volume or unexpectable the demand, is needlessly to burden the owner and encumber the vessel, as well as to impose the severe penalty of liability without fault in a minor area in which the protection of the seaman does not require it. The "absolute duty" of providing a seaworthy vessel and appliances (*Seas Shipping Company,*

[3] With the exception that "every vessel bound on any foreign voyage exceeding in length fourteen days shall also be provided with at least one suit of woolen clothing for each seaman." R. S. 4572, 46 U. S. C. 669.

Inc. v. *Sieracki,* 328 U. S. 85, 94–95), which petitioner argues as analogy (Pet. 27–28), is obviously of a different order of significance, in view of the "hazards of marine service which unseaworthiness places on the men who perform it" (328 U. S. at 93) and the sailor's helplessness to discover or remedy such defects (cf. R. 19). Here petitioner as chief mate himself ordered the rubber boots for the slop chest (R. 6, 114).

2. Moreover, petitioner's contributory negligence was found by the lower courts to preclude recovery of "a very great proportion" of the damages to which he would be entitled on the unwarranted assumption that the United States had breached a duty owing to him (R. 17, 19). Petitioner's reply is that the slop chest provision is a "safety" statute, and that the Federal Employers Liability Act, as incorporated into the Jones Act, bars the defense of contributory negli-

---

[4] The Jones Act, 46 U. S. C. 688, provides in part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

The pertinent provision of the Federal Employers Liability Act, 45 U. S. C. 53, provides that the employee's contributory negligence—

"shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall

gence for injuries resulting from the violation of such enactments.[4] But the courts below correctly held that 46 U. S. C. 670 is primarily designed for the seaman's convenience, comfort, and pecuniary protection, rather than a "statute enacted for the *safety* of employees." The mark of a true safety statute is that its violation can be expected to result in bodily injury; but it is only the unique case in which breach of the slop chest requirement would lead to actual disability, rather than to inconvenience or discomfort.[5]

3. Finally, disposition of the case is controlled by the concurrent factual findings of both lower courts that, in any event, petitioner did not sustain the burden of proving that his disease was proximately caused by the respondent's alleged breach. The District Court carefully considered the inconclusive testimony of petitioner's expert witness, as well as the general knowledge in the field, and concluded that the petitioner had not

---

be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[5] In this respect, the instant statute differs markedly from the "warm room" statute (46 U. S. C. 669), requiring "every vessel in the foreign or domestic trade" to "provide a safe and warm room for the use of seamen in cold weather," and which has been held to be a "safety" statute. *Rooker* v. *Alaska Steamship Company*, 185 Wash. 71, certiorari denied, 299 U. S. 552. In addition to the difference in subject matter, the origin of the two statutes is dissimilar, as the District Court points out (R. 9, 17–18).

"convincingly shown that his tuberculosis was proximately caused by getting wet feet due to not having rubber boots" (R. 15), within the rule that proof of causation must be more than conjectural. *Cortes* v. *Baltimore Insular Line,* 66 F. 2d 526, 528 (C. C. A. 2); *Miller* v. *Lykes Bros.-Ripley S. S. Co.,* 98 F. 2d 185, 186 (C. C. A. 5), certiorari denied, 305 U. S. 641; *Rey* v. *Colonial Nav. Co.,* 116 F. 2d 580, 583 (C. C. A. 2). The trial judge's findings and discussion were adopted by the Circuit Court of Appeals. Review of such concurrent findings of fact is not merited. *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96, 98–99; *Just* v. *Chambers,* 312 U. S. 383, 385.

CONCLUSION

The findings and decision of the two lower courts are correct, and there is no conflict. The case turns upon a narrow factual issue of proximate cause. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
PEYTON FORD,
Assistant Attorney General.
SAMUEL D. SLADE,
OSCAR H. DAVIS,
Attorneys.

JUNE 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947